GJH AVENUE SDN BHD v. TRIBUNAL TUNTUTAN PEMBELI RUMAH, KEMENTERIAN KESEJAHTERAAN BANDAR, PERUMAHAN DAN KERAJAAN TEMPATAN & ORS AND OTHER APPEALS

COURT OF APPEAL, PUTRAJAYA
UMI KALTHUM ABDUL MAJID JCA
ZALEHA YUSOF JCA
YAACOB MD SAM JCA
[CIVIL APPEALS NO: M-01(A)-388-10-2017, M-01(A)-389-10-2017, M-01(A)-450-11-2017 & M-01(A)-451-11-2017]
20 AUGUST 2019

ADMINISTRATIVE LAW: *Judicial review – Application for – Challenge against Tribunal's award in favour of purchasers of bungalow units – Late delivery of vacant possession – Tribunal allowed purchasers' claim for liquidated ascertained damages – Whether Tribunal contravened reg. 11 of Housing Development (Control and Licensing) Regulations 1989 – Whether Tribunal committed statutory breach tantamount to error of law – Whether Tribunal acted ultra vires – Whether Tribunal acted beyond scope of lawful powers in making award – Whether award tainted with illegality – Housing Development (Control and Licensing) Act 1966, ss. 16B, 24 – Housing Development (Control and Licensing) Regulations 1989, reg. 11*

The appellant was a housing developer of a development project ('the project'). The first respondent was established under s. 16B of the Housing Development (Control and Licensing) Act 1966 ('HAD 1966') with powers and duties under HAD 1966 and also the Housing Development (Control and Licensing) Regulations 1989 ('HDR 1989') and the Housing Development (Tribunal for Homebuyer Claims) Regulations 2002 ('HDR 2002'). The second and third respondents were individual purchasers of a bungalow unit of the project. The eldest son of the second respondent ('Ong') had booked to purchase three bungalow units of the project and paid RM5,000 for each unit as first part deposit to secure the units. However, Ong made a request to cancel his name and to substitute his name with the names of the second and third respondents as purchasers of the said unit. The balance of the 10% deposit of RM35,260 for the purchase of the said unit was paid by the second and third respondents. The sale and purchase agreement ('SPA') for the said unit was signed between the parties and notice of delivery of vacant possession for the said unit was issued by the appellant. Clause 22 of the SPA required vacant possession to be delivered within 24 months from the date of the agreement. As the SPA was signed on 13 February 2012, and vacant possession was issued on 14 February 2014, the appellant took the stand that they were only two days late in delivering the vacant possession of the said unit. The appellant had made payment for

damages for late delivery of vacant possession of the said unit on 1 April 2014 amounting to RM220.60. The payment was duly accepted by the second and third respondents without any dispute or protest. Nevertheless, after two and a half years, the second and third respondents filed their claim at the first respondent's office for liquidated ascertained damages ('LAD') against the appellant for a higher sum. At the end of the hearing of the claim, the first respondent awarded the sum of RM12,353.76 as LAD for the said unit. The first respondent had decided that although cl. 22(1) of the SPA provides that vacant possession was to be delivered within 24 calendar months from the date of the agreement, the date to be taken into consideration to calculate the LAD was not the date appearing on the SPA but the date on which the booking fee was paid. Dissatisfied with the award, the appellant filed a judicial review ('JR') application at the High Court to quash the entire decision of the first respondent. The JR application was heard and disposed off. Hence, this appeal. The issue before the court was whether in making the award, the first respondent had contravened reg. 11 of the HDR 1989 and had committed a statutory breach which tantamount to an error of law and/or had acted *ultra vires* the HAD 1966 and the HDR 1989 and as a consequence thereof, the award was tainted with illegality.

Held (allowing appeal)
Per Zaleha Yusof JCA delivering the judgment of the court:

(1) Clause 22 of the SPA was very clear and unambiguous. It specifically provides that vacant possession shall be delivered within 24 calendar months 'from the date of this agreement'. The date of the agreement was 13 February 2012. The Tribunal ought to have applied the law as clearly stipulated in Schedule G, particularly in cl. 22 pursuant to s. 24 of HDA 1966 and reg. 11(1) of HDR 1989. The amendment to the law was made and the creation of the Tribunal was to simplify the claims of home buyers. Hence, it was not for the Tribunal, in this case the first respondent, to sieve through the authorities to justify its finding of the meaning of the 'date of this agreement', but to apply the law; in this case cl. 22, which was so clearly worded, to decide on the claim. (paras 24 & 28)

(2) The contract of sale was the SPA. There was no clause which allowed the collection of deposit. Even the 10% of purchase price, according to its Third Schedule, could only be collected upon the signing of the SPA; and not before. The fact that the law prohibits the collection of deposit when it is not provided for by the SPA clearly indicated that 'the date of the agreement' as provided for in the SPA was the actual date the SPA was entered into. The Form G contract is a statutory contract, prescribed by law. The law as prescribed does not allow the parties to a contract in Form G to contract out of the scheduled form. (paras 35 & 36)

(3) A decision maker must correctly understand the law that regulates his decision making power and must give effect to it or else his decision would be tainted with illegality. The first respondent had failed to understand that in exercising its power, it could not go beyond the four corners of the Act and regulations that created it and gave it powers. The first respondent had acted beyond the scope of its lawful powers in making the award. Thus, it had contravened reg. 11 of the HDR 1989 and had committed a statutory breach which tantamount to an error of law and had acted *ultra vires* the HDA 1966 and the HDR 1989. As a consequence thereof, the award was tainted with illegality. (paras 32 & 37)

Case(s) referred to:

Badan Peguam Malaysia v. Kerajaan Malaysia [2008] 1 CLJ 521 FC ***(refd)***
Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 ***(refd)***
Faber Union Sdn Bhd v. Chew Nyat Shong & Anor [1995] 3 CLJ 797 SC ***(refd)***
Faber Union Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Perumahan Dan Kerajaan Tempatan & Ors [2011] 7 CLJ 37 HC ***(refd)***
Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals [2018] 1 CLJ 693 FC ***(refd)***
Foong Seong Equipment Sdn Bhd v. Keris Properties (PK) Sdn Bhd [2009] 1 LNS 442 CA ***(dist)***
Hoo See Sen & Anor v. Public Bank Bhd & Anor [1988] 1 CLJ 768; [1988] 1 CLJ (Rep) 125 SC ***(refd)***
Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor And Another Appeal [2004] 1 CLJ 797 CA ***(refd)***
Kompobina Holding Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor [2017] 1 LNS 2034 CA ***(refd)***
Krishnadas Achutan Nair & Ors v. Maniyam Samykano [1997] 1 CLJ 636 FC ***(refd)***
Lim Eh Fah & Ors v. Seri Maju Padu [2002] 4 CLJ 37 HC ***(refd)***
Nippon Express (M) Sdn Bhd v. Che Kiang Realty Sdn Bhd & Another Appeal [2013] 7 CLJ 713 CA ***(refd)***
Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union [1995] 2 CLJ 748 CA ***(refd)***

Legislation referred to:

Housing Development (Control and Licensing) Act 1966, ss. 16B, 24(2)(c)
Housing Development (Control and Licensing) Regulations 1989, reg. 11(1), (2)

For the appellant - Sheena Sinnappah & Valerie Fernando; M/s Sheena Valerie & Partners
For the respondents - Mae Taye Wei Keen & Zaidah Ibrahimi Hussaimi; M/s Taye & Co

[Editor's note: Appeal from High Court, Melaka; Judicial Review No: 25-19-11-2016 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Zaleha Yusof JCA:

[1] These four appeals emanate from the orders of the High Court at Melaka, two dated 29 September 2017 and the other two dated 31 October 2017. The two orders dated 29 September 2017 were in respect of appeals M-01(A)-388-10-2017 (Appeal No. 388) and M-01(A)-389-10-2017 (Appeal No. 389) decided by Justice Vazeer Alam Mydin Meera; while the other two orders dated 31 October 2017 were in respect of appeals M-01(A)-450-11-2017 (Appeal No. 450) and M-01(A)-451-11-2017 (Appeal No. 451) decided by Justice Siti Khadijah bt S Hassan Badjenid.

[2] The honourable justices had dismissed the appellant's judicial review (JR) applications, seeking to challenge the first respondent's awards dated 26 October 2016 (the awards) in favour of the other respondents wherein the appellant was ordered to pay the other respondents damages for late delivery of vacant possession. The appellant also sought for a declaration that the decision of the first respondent was invalid, *ultra vires* and null and void.

[3] Before us, parties had agreed to submit on Appeal No. 388 and the submissions would be adopted for Appeal No. 389, Appeal No. 450 and Appeal No. 451. In other words, the decision of this Court in Appeal No. 388 would bind the other appeals. Hence, our considerations are confined to Appeal No. 388.

Parties

[4] The parties in Appeal No. 388 are GJH Avenue Sdn Bhd as the appellant; Tribunal Tuntutan Pembeli Rumah, Kementerian Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan as the first respondent; Lee Soo Hai @ Lee Yok Chan as the second respondent and Ong Lan Wai as the third respondent.

[5] The appellant is a housing developer of a development project known as Taman Paya Rumput Perdana Fasa 2 situated in Mukim Paya Rumput, Daerah Melaka Tengah, Melaka ("the project").

[6] The first respondent is established under s. 16B of the Housing Development (Control and Licensing) Act 1966 (HDA 1966) with powers and duties under HDA 1966 and also the Housing Development (Control and Licensing) Regulations 1989 (HDR 1989) and the Housing Development (Tribunal for Homebuyer Claims) Regulations 2002 (HDR 2002).

[7] The second and third respondents in Appeal No. 388 are individual purchasers of a bungalow unit of the project.

A **Brief Facts**

[8] One Ong See Chen, the eldest son of the second respondent, had on 24 October 2011 booked to purchase three bungalow units Type L of the project and paid RM5,000 for each unit as first part deposit to secure the units. One of the bungalow units is known as Unit No. L.274/PT No. 5415 (the said unit). For the purpose of this Appeal No. 388, we are only concerned with the said unit.

[9] However, on 3 December 2011, the said Ong See Chen made a request to cancel his name and to substitute his name with the names of the second and the third respondents as purchasers of the said unit.

[10] The balance of the 10% deposit of RM35,260 for the purchase of the said unit was paid by the second and the third respondents on 13 December 2011. The sale and purchase agreement (SPA) for the said unit was signed between the parties on 13 February 2012 at the purchase price of RM402,600.

[11] Notice of delivery of vacant possession for the said unit was issued by the appellant on 14 February 2014.

[12] Clause 22 of the SPA requires vacant possession to be delivered within 24 months from the date of the agreement. As the SPA was signed on 13 February 2012, and the vacant possession was issued on 14 February 2014, the appellant took a stand that they were only two days late in delivering the vacant possession of the said unit.

[13] The appellant had made payment for damages for late delivery of vacant possession of the said unit on 1 April 2014 amounting to RM220.60. The payment was duly accepted by the second and third respondents without any dispute or protest.

[14] Nevertheless, after 2½ years, the second and third respondents filed their claim at the first respondent's office for liquidated ascertained damages (LAD) against the appellant for a higher sum *vide* Tuntutan No. TTPR/M/0842/16.

[15] At the end of the hearing of the claim, the first respondent awarded the sum of RM12,353.76 as LAD for the said unit.

[16] Dissatisfied with the award, the appellant filed the JR application at the High Court at Melaka to quash the entire decision of the first respondent. The JR application was heard and disposed of as alluded to in paras. [1] and [2] of this judgment, and which is now the subject of appeal before us.

Issue

[17] Being a judicial review matter, the court's function is to examine the conduct of the authority to ensure that it has acted within the scope of its lawful power. The authority in this case is the first respondent. Hence, the

issue before the court is whether in making the award dated 26 October 2016, the first respondent had contravened reg. 11 HDR 1989 and had committed a statutory breach which tantamount to an error of law and/or had acted *ultra vires* the HDA 1966 and the HDR 1989 and as a consequence thereof, the award was tainted with illegality. We need to decide whether the Learned High Court Judge erred in affirming the decision of the first respondent.

High Court's Finding

[18] The learned High Court Judge had found that the first respondent had neither committed any illegality nor was the decision irrational in the sense of the *Wednesbury* unreasonableness. His Lordship found that the first respondent had in fact quite correctly applied the law to the facts in making the award.

[19] The first respondent had decided that although cl. 22(1) of the SPA provides that vacant possession is to be delivered within 24 calendar months from the date of the agreement, the date to be taken into consideration to calculate the LAD is not the date appearing on the SPA but the date on which the booking fee was paid.

[20] The learned High Court Judge found that was the correct approach based on two decisions of Supreme Court in *Hoo See Sen & Anor v. Public Bank Bhd & Anor* [1988] 1 CLJ 768; [1988] 1 CLJ (Rep) 125 and *Faber Union Sdn Bhd v. Chew Nyat Shong & Anor* [1995] 3 CLJ 797. The first respondent based its decision on two decisions of the High Court in *Lim Eh Fah & Ors v. Seri Maju Padu* [2002] 4 CLJ 37 and *Faber Union Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah, Kementerian Perumahan Dan Kerajaan Tempatan & Ors* [2011] 7 CLJ 37. Both these High Court decisions had also relied on *Hoo See Sen*, *supra*, and *Chew Nyat Shong*, *supra*. In *Chew Nyat Hong*, *supra*, the case of *Hoo See Sen*, *supra* was referred to and it was held that for the purpose of ascertaining the date of delivery of vacant possession, the relevant date when time starts to run is the date when the purchaser paid the booking fee.

[21] His Lordship further opined that he as well as the first respondent were bound by those decisions by virtue of the doctrine of *stare decisis* especially when the same construction had been applied by the Court of Appeal in several cases which involved the schedule G type of sale and purchase agreements. Those cases which he cited were *Foong Seong Equipment Sdn Bhd v. Keris Properties (PK) Sdn Bhd* [2009] 1 LNS 442; and *Nippon Express (M) Sdn Bhd v. Che Kiang Realty Sdn Bhd & Another Appeal* [2013] 7 CLJ 713.

Our Decision

[22] Our first task was to examine the relevant provision of the SPA to ensure its conformity with the HDA 1966 and the HDR 1989. In this instant appeal, the relevant provision of the SPA is cl. 22 which reads as follows:

A Time for delivery of vacant possession

22. (1) Vacant possession of the said Building shall be delivered to the Purchaser in the manner stipulated in clause 23 herein within twenty-four (24) calendar months from the date of this Agreement

B (2) If the Vendor fails to deliver vacant possession of the said Building in manner stipulated in clause 23 herein within the time stipulated in sub-clause (1), the Vendor shall be liable to pay to the Purchaser liquidated damages calculated from day to day at the rate of ten per centum (10%) per annum of the purchase price from the expiry date of the delivery of the vacant possession in sub-clause (1) until the date the Purchaser takes vacant possession of the said Building. Such liquidated damages shall be C paid by the Vendor to the Purchaser immediately upon the date the Purchaser takes vacant possession of the said Building.

(3) For the avoidance of doubt, any cause of action to claim liquidated damages by the Purchaser under this clause shall accrue on the date the Purchaser takes vacant possession of the said Building.

D **[23]** This cl. 22, and in fact the whole SPA is a Schedule G statutory contract as prescribed by reg. 11(1) of the HDR 1989 which *inter alia* reads as follows:

11. Contract of sale

E (1) Every contract of sale for the sale and purchase of a housing accommodation together with the subdivisional portion of land appurtenant thereto shall be in the form prescribed in Schedule G; and ...

Regulation 11 of HDR 1989 was made pursuant to s. 24(2)(c) of the HDA F 1966.

[24] Clause 22 as enumerated above, in our view is very clear and unambiguous. It specifically provides that vacant possession shall be delivered within 24 calendar months "from the date of this agreement". The date of the agreement as stated on the first page of the SPA is 13 February G 2012.

[25] With such a clear provision, does the court still need to go through various authorities to find the meaning of the words "from the date of this agreement"? With due respect to the two Supreme Court decisions relied upon by the learned High Court Judge, we do not think so. The Federal H Court in *Badan Peguam Malaysia v. Kerajaan Malaysia* [2008] 1 CLJ 521; [2007] 2 MLRA 847 had, at p. 559 (CLJ); p. 868 (MLRA), per Hashim Yusoff FCJ stated the following:

The Federal Court in *Malaysian Bar v. Dato' Kanagalingam Veluppillai* I [2004] 4 CLJ 194; [2004] 1 MLRA 542; [2004] 4 MLJ 153; [2004] 5 AMR 441 at p. 200 agreed with the observation made by Lord Diplock in *Duport Steels Ltd & Ors v. Sirs and Ors* [1980] 1 WLR 142 at p. 157, wherein his Lordship said:

Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to the plain meaning. (emphasis added)

[26] See also the Federal Court case of *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Other Appeals* [2018] 1 CLJ 693; [2018] 1 MLRA 89.

[27] The two Supreme Court decisions in *Hoo See Sen, supra*, and *Chew Nyat Shoong*, *supra*, concerned sale and purchase agreements which were pre-Schedule G of the HDR 1989 and pre-HDR 2002. Effective 1 December 2002, the Tribunal for Homebuyers Claim (the Tribunal) was first established *via* the amendment to the HDA 1966. We must bear in mind that the Tribunal is an administrative tribunal and not a court of law. According to the Hansard, second and third readings, the Tribunal was established for the purpose of minimising the burden that purchasers have to face in order to claim remedies from developers.

[28] Thus, the Tribunal, in our view, is to apply the law as clearly stipulated in Schedule G, particularly in cl. 22 pursuant to s. 24 HDA 1966 and reg. 11(1) of HDR 1989. The amendment to the law was made and the creation of the Tribunal was to simplify the claims of home buyers. Hence, it is not for the Tribunal, in this case the first respondent, to sieve through the authorities to justify its finding of the meaning of the "date of this agreement", but to apply the law; in this case cl. 22; which is so clearly worded, to decide on the claim.

[29] The role of a tribunal had been considered by this court in *Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers Union* [1995] 2 CLJ 748; [1995] 1 MLRA 268, *inter alia*, as follows:

... where Parliament confers on an administrative tribunal or authority, **as distinct from a Court of law**, power to decide particular questions defined by the Act conferring the power, Parliament intends to confine that power to answering the question as it has been so defined: and if there has been any doubt as to what that question is, this is a matter for Courts of law to resolve in fulfilment of their constitutional role as interpreters of the written law and expounders of the common law and rules of equity. So if the administrative tribunal or authority has asked themselves the wrong question and answered that, they have done something that the Act does not empower them to do and their decision is a nullity. Parliament can, of course, if it so desires, confer upon administrative tribunals or authorities power to decide questions of law as well as questions of fact or of administrative policy; but this requires clear words, for the presumption is that where a decision-making power is conferred on a tribunal or authority that is not a Court of law, Parliament did not intend to do so. The break-through made by *Anisminic* [1969] 2 AC 147 was that, as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished. (emphasis added)

[30] As the provision of cl. 22 is clear an unambiguous, the first respondent should not have been roaming over the authorities to interpret it but to simply apply the provision as it is. See the decision of this court in *Ibrahim Ismail & Anor v. Hasnah Puteh Imat & Anor and Another Appeal* [2004] 1 CLJ 797; [2003] 2 MLRA.

[31] The Federal Court in the case of *Krishnadas Achutan Nair & Ors v. Maniyam Samykano* [1997] 1 CLJ 636; [1997] 1 MLJ 94 had stated at p. 645 (CLJ); p. 100 (MLJ), the following:

> ... The function of a court when construing an Act of Parliament is to interpret the statute in order **to ascertain legislative intent primarily by reference to the words appearing** in the particular enactment. *Prima facie*, every word appearing in an Act must bear some meaning. For Parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:
>
> > As a general rule a court will adopt that construction of a statute will give some effect to all of the words which it contains. (Per Gibbs J in *Beckwith v. R* (1976) 12 ALR 333, at p. 33.
>
> (emphasis added)

[32] A decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it or else his decision will be tainted with illegality and be a ground for judicial review. See: *Council of Civil Service Unions v. Minister for the Civil Service* [1985] AC 374. This was what happened in this instant appeal. We found the first respondent had failed to understand that in exercising its power, it cannot go beyond the four corners of the Act and Regulations that created it and gave it powers.

[33] With due respect to the learned High Court Judge, we found that he erred when His Lordship failed to see the error of law committed by the first respondent. We had no issue with the doctrine of *stare decisis* but the two Supreme Court decisions of *Hoo See Sen*, *supra*, and *Chew Nyet Shong*, *supra*, as well as the two Court of Appeal cases of *Foong Seong Equipment*, *supra*, and *Nippon Express (M) Sdn Bhd*, *supra*, which were relied heavily by the learned High Court Judge could easily be distinguished. We perused the two latter cases and found that the sale and purchase agreements involved therein were not Form G type of agreements.

[34] As alluded to earlier, the case of *Chew Nyet Shong*, *supra*, followed the decision of *Hoo See Sen*, *supra*, which was pre-Tribunal and pre-HDR 1989. There is one provision in HDR 1989 which had not been discussed by any of the authorities mentioned above. The provision is reg. 11(2) which provides as follows:

> (2) No housing developer shall collect any payment by whatever name called except as prescribed by the contract of sale.

[35] In the appeal before us, the contract of sale is the SPA. We combed through the SPA and could not find any clause which allowed the collection of deposit. Even the 10% of purchase price, according to its third schedule, can only be collected upon the signing of the SPA; and not before. Learned counsel for the second and third respondents in her written submissions had submitted that the appellant, by collecting deposit, had breached the law and thus precluded from defending the second and third respondents' claim for LAD to be calculated from the date of deposit paid.

[36] With due respect, we were of the contrary view. It was our considered view that the fact that the law prohibits the collection of deposit when it is not provided for by the SPA clearly indicates that "the date of the agreement" as provided for in the SPA is the actual date the SPA was entered into. The Form G contract is a statutory contract, prescribed by law. The law as prescribed does not allow the parties to a contract in Form G to contract out of the scheduled form.

Conclusion

[37] For the reasons given, we were of the considered view that the first respondent had acted beyond the scope of its lawful powers in making the award dated 26 October 2016. Thus it had contravened reg. 11 of the HDR 1989 and had committed a statutory breach which tantamounted to an error of law and had acted *ultra vires* the HDA 1966 and the HDR 1989. As a consequence thereof the award was tainted with illegality. Following that, we found that the learned High Court Judge had erred in affirming the decision of the first respondent.

[38] In *Kompobina Holding Sdn Bhd v. Tribunal Tuntutan Pembeli Rumah & Anor* [2017] 1 LNS 2034; [2017] MLJU 2268, this court had upheld the decision of the High Court which also involved the same Schedule G agreement in which cl. 22 of the SPA therein provided that the date of delivery of vacant possession was 24 months from the date of SPA. The High Court had decided that the clear provision of cl. 22 of the SPA must be adhered to which meant that the date of the agreement was the date the SPA was entered into.

[39] We were shown many conflicting decisions of the Tribunal on this similar cl. 22. It was our view, where the letter of the law is clear, we must take heed of it. There is indeed nothing to be interpreted on.

[40] We therefore unanimously allowed this Appeal No. 388. As parties had agreed to be bound by the decision of this court in Appeal No. 388, we also allowed Appeal No. 389, Appeal No. 450 and Appeal No. 451. The orders of the High Court dated 29 September 2017 and 31 October 2017 in respect of all the appeals were set aside with no order as to costs.